IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 10-10-2007

CORAM

THE HON'BLE MR.JUSTICE N.PAUL VASANTHAKUMAR

W.P.No.10144, 15067 and 17307 of 2006
(O.A.No.1646/1999, 718/1995 and 5332/1994)

T. Titus ... Petitioner in all the writ petitions

Vs

1. The State of Tamil nadu,
rep.by the Secretary to Government,
P & AR Department,
Secretariat,
Chennai - 9.

2. The Joint Director of Agriculture,
Nagercoil - 1.
... Respondents in W.P.No.10144/2006

1. The Director of Agriculture,
Madras.

2. The Joint Director of Agriculture,
Nagercoil ... Respondents in W.P.No.15067/2006 &
W.P.No.17307/2006

Prayer in W.P.No.10144/2006: This writ petition came to be numbered under Article 226 of Constitution of India, by way of transfer of O.A.No.1646 of 1999 from the file of the Tamil Nadu Administrative Tribunal with a prayer to call for the records on the file of the respondents 1 and 2 in their proceedings G.O.Ms.No.477 P&AR Department, dated 21.11.1990 and in No.Pa3.41975/93 dated 15.2.1999 respectively and quash the same and direct the respondents to reinstate the petitioner with all monetary and service benefits by issuing writ of certiorarified mandamus.

Prayer in W.P.No.15067/2006: This writ petition came to be numbered by way of transfer of O.A.No.718 of 1995 from the file of Tamil Nadu Administrative Tribunal with a prayer to issue a writ of Certiorarified Mandamus to call for the records relating to the proceedings of the Joint Director of Agriculture,

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Nagercoil, in Pa.Ni3/41975/93 dated 20.1.1995 and quash the same and direct the respondents to pay the petitioner all his back wages with all consequential service benefits during the period for which he has not been given posting.

Prayer in W.P.No.17307/2006: This writ petition came to be numbered by way of transfer of O.A.No.5332 of 1994 from the file of Tamil Nadu Administrative Tribunal with a prayer to issue a writ of Certiorarified Mandamus to call for the records relating to the proceedings of the Joint Director of Agriculture, Nagercoil, in Pa.Ni3/41975/93 dated 25.10.1994 and quash the same and direct the respondents to pay the petitioner all his back wages with all service benefits during the period for which he has not been given posting and also take action against the second respondent for giving false information and ungenuine facts by concealing entire proceedings that the petitioner was on long leave till 9.3.1994 and R.A.No.67 of 1994 was posted on 14.11.1994 to the disposal of the case by allowing the petition.

For Petitioner in all petitions : Mr.M.T.Arunan

For Respondents in all petitions : Mr.V.Manoharan, Government Advocate

COMMON ORDER

Prayer in W.P.No.10144 of 2006 is to quash G.O.Ms.No.477 P&AR Department dated 21.11.1990 and the proceedings of the Joint Director of Agriculture, Nagercoil/second respondent herein, dated 15.2.1999 and to direct the respondents to reinstate the petitioner in service with all monetary and service benefits.

2. W.P.No.15067 and 17307 of 2006 are filed to quash the proceedings of the Joint Director of Agriculture, Nagercoil/second respondent herein, dated 20.1.1995 and 25.10.1994 respectively and to direct the respondents to pay all backwages and consequential service benefits for the period in which no posting was given to the petitioner.

3. By disposing W.P.No.10144 of 2006, the issues involved in the other two writ petitions can also be resolved. Hence all the writ petitions are disposed of by this common order.

4. The brief facts necessary for disposal of the writ petitions are as follows:

(a) Petitioner was appointed as Junior Assistant-cum-Typist on 15.11.1983 at Nagercoil and on 9.3.1994 he was transferred to Pudukkottai. Petitioner challenged the said order of transfer in

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O.A.No.1416 of 1994 before the Tamil Nadu Administrative Tribunal and obtained an order of interim stay on 13.3.1994. O.A.No.1416 of 1994 was dismissed on 6.5.1994 and the interim stay granted earlier was also vacated.

(b) Petitioner filed R.A.No.67 of 1994 and on 4.10.1994 the Tribunal directed the second respondent to accommodate the petitioner in Kanyakumari District. The said order having not been implemented, petitioner filed Contempt Application No.100 of 1995 before the Tribunal. The petitioner was given posting order and he joined at Nagercoil on 28.8.1995. Thus, the petitioner was not permitted to work from 9.3.1994 till 28.8.1995 by not giving posting orders.

(c) On 20.1.1995, a charge memo framed under Rule 17(b) of the Tamil Nadu Civil Services (Discipline and Appeal) Rules, was issued to the petitioner and the translated version of the same reads as follows:

> "1. Thiru T.Titus, Junior Assistant, without applying for leave, unauthorisedly absented himself from duty from 20.12.1993 and the period of absence without leave application is one year as on 19.12.1994. Thus, he has violated G.O.Ms.No.1046 P&AR Department dated 13.11.1987.
>
> 2. Thiru T.Titus, Junior Assistant worked for more than eight years in Kanyakumari District. Even though he got reposting in Kanyakumar District, he was going on long leave and as no person having been appointed in his leave vacancy, he was transferred to Pudukkottai District as per the existing rules. To avoid transfer, he filed O.A.No.1416/1994, R.A.No.67/1994 and C.A.No.446 of 1994 on false grounds before the Tamil Nadu Administrative Tribunal in violation of the Rules and Practice."

Petitioner challenged the said charge memo before the Tribunal in O.A.No.5332 of 1995 and the Tribunal by order dated 7.11.1994 directed the second respondent not to pass any final order with regard to the said charge memo.

(d) Petitioner's claim for promotion to the post of Assistant came during the year 1998 as per his original seniority. Due to the pendency of the charge memo against the petitioner, his promotion was withheld. Therefore petitioner

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filed O.A.No.8510 of 1998 and prayed for completion of enquiry with regard to the charge memo referred above. The Tribunal by order dated 28.10.1998 directed the respondents to complete the enquiry within three months.

(e) After the said order was passed, the second respondent issued notice to the petitioner and called upon him to submit his explanation to the charges by reply dated 19.1.1999. Petitioner submitted his explanation by post on 25.1.1999 and thereafter according to the petitioner, without conducting any enquiry, order of removal from service was passed on 15.2.1999 on the ground that petitioner was on unauthorised absence.

(f) The said order of removal was challenged in O.A.No.1646 of 1999 and the Tribunal granted stay of the said order on 11.3.1999, which was extended and by virtue of the said stay order petitioner is continuously working till date. The removal order is challenged on the ground that in spite of the grant of stay of transfer order by the Tribunal as early as on 13.3.1994, petitioner was not given posting and only on 25.8.1995 petitioner was given posting orders and he immediately joined and therefore the said period cannot be treated as unauthorised absence and it should be treated as compulsory wait awaiting posting order as per F.R.9(6)(3) and the charge framed for the alleged unauthorised absence of more than one year i.e., from 20.12.1993 to 19.12.1994 is unsustainable. Insofar as the second charge is concerned, petitioner exercised his legal remedy available to the Government Servants and for moving the Court and obtaining orders, no Government employee shall be proceeded with departmentally.

5. Respondents have filed counter affidavit wherein it is stated that the petitioner was habitually taking leave. Petitioner was allotted to Pudukkottai District by the proceedings of the Joint Director of Agriculture, Pudukkottai, dated 9.3.1994 and he was given posting by order dated 25.3.1994 and he has not joined at Pudukkottai, nor extended his leave. As the petitioner absented from 20.12.1993, by notice dated 30.9.1994 he was instructed to join at Pudukkottai before 14.11.1994, failing which he was informed that action will be taken as per G.o.Ms.No.1046 P&AR Department, dated 13.11.1987 to remove him from service. Petitioner having not joined even after receipt of the said notice, charges were framed under Rule 17(b) of the Tamil Nadu Civil Services (Discipline and Appeal) Rules by issuing charge memo on 20.1.1995. The said charge memo was challenged and the department was restrained from passing final orders. However, in the subsequent O.A.No.8510 of 1998 filed by the petitioner, the Tribunal directed the respondents to complete the enquiry and pass final orders within a period of three months

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by order dated 28.10.1998. Petitioner having not attended enquiry conducted in the year 1995, he was set exparte and exparte enquiry report was submitted on 7.8.1995, holding that the charges levelled against the petitioner were held proved. Based on the said report second respondent through his proceedings dated 15.2.1999 passed an order removing the petitioner from service. It is further stated that the petitioner having unauthorisedly absented for more than one year, he was rightly proceeded with as per the Government orders in force and no exception could be taken to the said order of punishment imposed on the petitioner.

6. The learned counsel for the petitioner argued that the transfer order dated 9.3.1994 having been stayed in O.A.No.1416 of 1994 on 13.3.1994 and the stay was vacated only on 6.5.1994. Petitioner also filed R.A.No.67 of 1994 and the Tribunal passed order on 4.10.1994 and posting order was given only on 25.8.1995 and therefore the petitioner cannot be termed as unauthorisedly absented as the petitioner was willing to work and only due to want of posting order at Nagercoil, he was prevented from attending his duties and the entire period shall be treated as compulsory wait and as such the charge framed against the petitioner for unauthorised absence for more than one year is baseless. According to the learned counsel, the second charge framed is also unsustainable in view of the fact that as a Government servant, the petitioner is entitled to seek the legal remedy available to the Government servants, which the petitioner exercised, for which no charge could be framed. The learned counsel further argued that the petitioner was victimised, harassed and was compelled to file successive applications before the Tribunal to get justice.

7. The learned Government Advocate appearing for the respondents on the other hand submitted that the petitioner absented from duty unauthorisedly, for which charge memo was issued and the petitioner, in spite of giving opportunity to attend the enquiry, he remained adament and not attended the enquiry and therefore he was set exparte and based on the proved charges, petitioner was terminated from service. According to the learned Government Advocate, there is no illegality and the second respondent acted in terms of the Government orders in force which states that if a Government servant was unauthorisedly absented for one year or more, he can be removed from service.

8. I have considered the rival submissions made by the learned counsel for the petitioner as well as the learned Government Advocate.

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9. The point for consideration in these writ petitions is whether the charges framed against the petitioner are maintainable and the punishment imposed on him is just and proper and whether the petitioner is entitled to get the period from 13.3.1994 to 25.8.1995 as duty period.

10. Admittedly the petitioner challenged the order of transfer dated 9.3.1994 before the Tribunal in O.A.No.1416 of 1994 and the Tribunal granted interim stay of the Transfer order on 13.3.1994. However, petitioner was not given posting at Nagercoil. O.A.No.1416 of 1994 was disposed of on 6.5.1994 and the interim stay was vacated. Petitioner filed R.A.NO.67 of 1994 and the Tribunal on 4.10.1994 passed the following order,

> "O R D E R
>
> In O.A.No.1416/94, dated 6.5.1994, we have held as below:-
>
> "If as stated, the applicant has been working in the station from 15.9.93, normally he would not be liable to transfer. But, if he had entered on leave for an extended period, the transfer would inevitable, because the post cannot be vacant, awaiting return of the person leave. It is seen that he had been working in Kanyakumari District from 1983, except for a period between 22.8.91 and 16.12.1992 at Kodaikanal. Therefore, he should not have been retransferred to Kanyakumari District. The orders regarding posting of spouses in or near the same station is subject to the orders regarding tenure in a station."
>
> The Review Application states that posts are now available in Kanyakumari District and that he may be considered. This is not a matter for review of our orders. However, the applicant having been retransferred to Kanyakumari District, even though he had worked for 8 years earlier in the District, he could be allowed to work for a further period, if vacancies are available. He should represent to the departmental authorities for consideration."

11. Petitioner submitted application as directed in the review order for posting in Kanyakumari District and the same having not been considered, he filed Contempt Petition No.446 of

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1994 and 100 of 1995 and only after filing contempt petitions, petitioner was given posting at Nagercoil, on 25.8.1995 and the petitioner joined duty immediately thereafter.

12. The above referred legal proceedings initiated by the petitioner against the second respondent challenging the order of transfer and the final posting given on 25.8.1995 clearly establish the fact that the petitioner actually challenged the order of transfer and awaited to get posting order. The fact that petitioner was given posting at Nagercoil on 25.8.1995 pursuant to the orders of the Tribunal clearly establishes the fact that he had not absented from duty and he was awaiting posting orders immediately on receipt of the stay order granted by the Tribunal on 13.3.1994 and after the review order. Hence the respondents cannot treat the petitioner as unauthorised absentee, particularly when he was given posting on 25.8.1995.

13. The question of unauthorised absence will come only when no proceeding was initiated against the transfer order and no leave application was submitted. Here in this case, as per the above referred legal proceedings it is established that the petitioner challenged the order of transfer passed against him and he was awaiting posting order after obtaining stay of the transfer order and also after the review order, which ultimately was given on 25.8.1995. As rightly contended by the learned counsel for the petitioners as per F.R.9(6)(3), the said period shall be treated as compulsory wait period. Hence I am of the view that the charge of unauthorised absence of petitioner from 20.12.1993 to 19.12.1994 is not made out warranting to treat the petitioner as deserted in terms of G.O.Ms.No.1046 P&AR Department dated 13.11.1987.

14. The second charge framed against the petitioner is also not maintainable in view of the fact that approaching Tribunal for redressal of the grievance of the Government servants cannot be a ground to frame charge. The charge that to avoid transfer, petitioner filed original application, review application and contempt petition before the Administrative Tribunal on false grounds in violation of the Rules and Practice cannot be countenanced in view of the fact that transfer is a condition of service and judicial review of the said order is permissible on certain grounds.

15. The power of judicial review is vested to determine the legality of executive action and validity of legislation passed by the legislature. This power of judicial review is conferred on the judiciary by Articles 32 and 226 of the Constitution of India. The power of judicial review is an integral part of our constitutional system. Article 323A of the Constitution of India

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was inserted under the 42nd amendment with effect from 3.1.1977, which empowers the constitution of Administrative Tribunals. The Parliament enacted the Administrative Tribunals Act, 1985 (Act 13 of 1985) under the said Article viz., 323A. In the preamble of the Administrative Tribunals Act, 1985, it is stated as follows:

> "An Act to provide for the adjudication or trial by Administrative Tribunals of disputes and complaints with respect to recruitment and conditions of service of persons appointed to public services and posts in connection with the affairs of the Union or of any State or of any local or other authority within the territory of India or under the control of the Government of India of or any corporation or society owned or controlled by the Government in pursuance of Article 323A of the Constitution and for matters connected therewith or incidental thereto."

By virtue of Act 13 of 1985, Administrative Tribunals are constituted to question the action of the Government both Central and State. The Central Administrative Tribunals are constituted insofar as the Central Government employees are concerned and State Administrative Tribunal was constituted by the State of Tamil Nadu from 12.12.1988. Section 15 of the Administrative Tribunals Act, 1985, confers jurisdiction to the State Administrative Tribunals to deal with service matters including recruitment matters of the persons appointed to any civil services of the State or any civil post under the State.

16. Thus, the petitioner has invoked the jurisdiction of the State Administrative Tribunal by filing original application, review application and contempt petition, challenging the transfer order passed against him. The action of challenging the said order before the Tribunal was taken as cause of action to initiate disciplinary proceeding against the petitioner. The action of the second respondent is to be treated as arbitrary exercise of power as it is opposed to judicial review, conferred to every citizen by the Constitution of India. The power of judicial review of the service matter of the Government servants are vested with the Tribunals with a further judicial review to the High Courts under Article 226 of the Constitution of India as held by the Supreme Court in the case of L.Chandrakumar v. Union of India, reported in AIR 1997 SC 1125. The Administrative Tribunals were directed to act as Courts of first instance in respect of areas of law for which they have been constituted and the decision of the Tribunals are subject to judicial review under Article 226/227 and 32 of the Constitution of India and in the High Courts, the matters are directed to be heard by the

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Division Bench. Hence it is clear that moving the Tribunal by litigants at the first instance is the statutory right, given to the Government Servants, for which no disciplinary action can be initiated by the department. It is also not stated what is the rule violated by the petitioner in moving the Tribunal for redressal of his grievance.

17. A similar issue was considered by this Court in the decision reported in 2007 (3) LLN 932 (S. Subbuthai v. District Adi Dravidar Welfare Officer and Another) wherein it is held that going to the Court by a Government Servant is not an affront to the higher officers. In paragraph 6 it is held as follows:

> "6. Under any circumstances, such a conduct on the part of the first respondent is highly reprehensible. There is no rule by which the prior permission from the higher official should be obtained for approaching the Court of law for redressing the grievance of a Government servant. Going to the Court is not an affront to the higher officers. Though this Court is not inclined to take any contempt proceedings, however the first respondent by issuing a memo and in spite of on submissive explanation by imposing a penalty will really amount to interfering with the course of justice. The first respondent had not shown any rule or regulation which require prior permission to approach a constitutional Court. His attempt is to browbeat a poor teacher from vindicating her rights in a Court of law. If such actions are allowed without a check, it will lower the majesty of this Court in granting relief to citizens of this country."

Further, petitioner obtained favourable orders, pursuant to which he was given posting at Nagercoil by the second respondent on 25.8.1995. Hence the second charge framed against the petitioner is also not maintainable.

18. In the light of my above finding, the impugned order of removal from service dated 15.2.1999, passed against the petitioner is unsustainable. Since the Tribunal has granted stay and the petitioner is continuously working, by setting aside the said order, no prejudice will be caused to the respondents.

19. For the reasons stated above, the impugned order dated 15.2.1999 is quashed and W.P.No.10144 of 2006 is allowed. No costs.

20. Since I have found that the charges levelled against the petitioner are not maintainable, the writ petitions challenging

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the charge memo dated 20.1.1995 are to be allowed. The contention that petitioner need not be given salary during the period of stay cannot be accepted in view of the judgment of the Supreme Court reported in (2004) 11 SCC 550 (Electronics Corporation of India Ltd v. Sateesh S. Rao Sonawalkar). The Supreme Court upheld the course adopted by the High Court in the said case to evolve the possible solution in the matter and in paragraphs 8 and 9 held as follows:

> "8. We have, however, considered the whole matter including the order passed by the High Court. The High Court thought in the best interest of both the parties, namely, the organisation as well as the respondent to pass the impugned order. The direction was to regularise the period of absence even though it was without sanction of leave, by treating the period spent on extraordinary leave as per the relevant rules. As indicated by the learned counsel for the appellants, extraordinary leave for a period of three months at one stretch can be granted by the management without pay and for period beyond that, it may be granted by the higher authorities. It is further submitted that the period with effect from 17-7-1995 to 8-11-1995 can be adjusted against earned leave on full salary. Thereafter, the respondent was granted three months' extraordinary leave without pay w.e.f. 9-11-1995 to 7-2-1996 during which period he went abroad, namely, USA. The rest of the period may be allowed to be treated as the period on extraordinary leave without pay. We, however, find that the respondent had on 19-7-1995 obtained the stay order of his transfer. The respondent reported on duty with that order on the next day. The appellants sat tight over the matter for a period of five months, without bringing to the notice of the Court that the respondent stood relieved on 17-7-1995 and moved for vacation of the stay order only on 19-12-1995 and the stay order was vacated only on 8-4-1996, that is to say, the stay order remained operative w.e.f. 19-7-1995 till the date of its vacation i.e. on 8-4-1996. The respondent had made himself available and had reported on duty on 20-7-1995. This kind of relieving order, if passed on 17-7-1995, should have been brought

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to the notice of the Court at the earliest, rather than to allow it to continue for such a long time even though appearance on behalf of the appellants was put in before the Court much earlier. In the circumstances, the case of relieving of the respondent in the manner as indicated by the appellants is not liable to be accepted.

9. Therefore, we provide that the period from 17-7-1995 to 8-4-1996 shall be treated as the period spent on duty and the appellants shall pay full salary for the said period, excluding the period of three months w.e.f. 9-11-1995 to 7-2-1996 for which extraordinary leave was granted to the respondent to visit USA. The period after 8-4-1996 shall be adjusted against earned leave or any other such leave which according to the appellants have been made admissible to the respondent for the period from 17-7-1995 to 8-11-1995. The rest of the period has only to be regularised as against extraordinary leave without pay. In this manner the continuity of service of the respondent is also maintained and all the period of service would also stand regularised in the spirit of the order passed by the High Court. The arrears of salary to be calculated in the manner indicated above shall be worked out and paid within six weeks from today."

(Emphasis Supplied)

In view of the above decision, W.P.Nos.15067 and 17306 of 2006 are allowed with a direction to the respondents to pay salary and other benefits to the petitioner for the period in which the interim stay was in force and regularise the remaining period as per rules within eight weeks from the date of receipt of copy of this order.

The writ petitions are ordered accordingly with the above directions. No costs.

Sd/
Asst.Registrar

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Sub Asst.Registrar

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To

1. The Secretary to Government, P & AR Department,
   Secretariat, Chennai - 9.

2. The Director of Agriculture, Madras.

3. The Joint Director of Agriculture, Nagercoil - 1.

+1cc to Mr.M.T.Arunan,Advocate Sr 62917
+1cc to Govt. Pleader Sr 62604

KG (CO)
km/16.10.

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